

Sussex Research Online

De-constitutionalising collective labour rights: the case of Greece

Article (Accepted Version)

Katsaroumpas, Ioannis (2018) De-constitutionalising collective labour rights: the case of Greece. *Industrial Law Journal*, 47 (4). pp. 465-503. ISSN 0305-9332

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/69787/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

Copyright and reuse:

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

De-Constitutionalising Collective Labour Rights: The Case of Greece

Since 2010, multiple waves of EU/IMF-imposed legislative reforms have led to extensive deregulation or ‘de-construction’ of Greek collective labour law. While there are many accounts of the Greek reforms, no systematic attention has been devoted to the following paradox: how is such a de-construction possible, in a jurisdiction enjoying a strong domestic constitutionalisation of labour rights, and apparently observing multiple transnational collective labour rights, derived from the CFREU, ECHR, and ILO Conventions? This article sets out to investigate the constitutional dynamics behind the process termed here as ‘de-constitutionalisation’ of collective labour rights. It seeks to add two contributions to the existing literature. Firstly, taking its cue from Eric Tucker’s mapping of multi-level ‘capital’ and ‘labour’ constitutions developed in the Canadian context, it suggests that the Greek case of de-constitutionalisation is the cumulative result of a specific configuration of interactions between ‘aggressive’ EU-IMF conditionality at the level of transnational capital rights, and ‘defensive’ articulation of labour rights at domestic and transnational levels. As will be seen, these interactions disguise an asymmetric clash between a strong constitutionalisation of capital rights at transnational level, and a weak constitutionalisation of labour rights at both transnational and domestic levels. Secondly, the article projects the Greek case onto the broader constitutionalisation debate, which questions the desirability of constitutionalising collective labour rights as an effective response to neo-liberal policies and laws. While submitting that the Greek developments support the sceptical side of this debate, especially by providing a continental European confirmation of Tucker’s thesis, the article offers several new reflections of relevance to the constitutionalisation debate.

De-Constitutionalising Collective Labour Rights: The Case of Greece

Ioannis Katsaroumpas*

1. Introduction

We live in paradoxical times. Labour scholars have recently witnessed the rise of a ‘polycentric’¹ universe of collective labour rights. Never before have there been so many transnational sources of collective labour rights (EU Charter of Fundamental Rights, European Convention on Human Rights, European Social Charter, ILO Conventions).² This process is described as a form of constitutionalisation.³ And yet, this ‘rights inflation’ did not arrest the ongoing neo-liberal assault against collective labour rights in Europe, mounted in the name of austerity, competitiveness and fiscal discipline.⁴ Recent Greek developments throw this paradox into sharp relief. Greek collective labour law (CLL) may benefit from a constitutional scheme of express collective labour rights (collective autonomy, collective bargaining, trade

* Lecturer in Employment Law. University of Sussex. I.Katsaroumpas@sussex.ac.uk. I am grateful to Dr Amir Paz-Fuchs, Quentin Detienne, Dr Menelaos Markakis, Professor Jo Bridgeman, the two anonymous reviewers and Alastair Nicolson for their comments on an earlier draft. As this article develops a doctoral thesis chapter, I am immensely grateful to my supervisor Professor Alan Bogg for his invaluable comments and to Professor Keith Ewing, Professor Mark Freedland and Dr Jeremias Prassl who commented as examiners. The usual disclaimer applies. This article is devoted to the memory of Dimitrios Panou. His struggles for social justice, labour emancipation and for the end of the austerity regime in Greece are never to be forgotten.

¹ Claire Kilpatrick, ‘Has Polycentric Strike Law Arrived in the UK? After *Laval*, After *Viking*, After *Demir*?’ (2014) 30(3) *International Journal of Comparative Labour Law and Industrial Relations* 293.

² The notable development was the Strasbourg Court’s expansion of Article 11 of ECHR to encompass the right to collective bargaining in *Demir and Baykara v Turkey* [2008] ECHR 1345, and right of strike in *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251. Since these decisions relied on the ILO’s Committee on Freedom of Association jurisprudence for justifying this expansion, this development created the potential for various synergistic interactions between the CFREU, ECHR and ILO standards.

³ See Judy Fudge, ‘Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes’ (2015) 68(1) *Current Legal Problems* 267 and Judy Fudge, ‘Constitutionalizing Labour Rights in Europe’ in Tom Campbell, K.D. Ewing and Adam Tompkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: OUP, 2011); see also Alan Bogg and Keith D. Ewing, ‘Freedom of Association’ in Matthew W. Finkin and Guy Mundlak (eds), *Comparative Labor Law* (Cheltenham: Edward Elgar, 2015), especially 302-306.

⁴ Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Oxford: Hart, 2014) and Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge: CUP, 2013).

union freedoms, right to strike), strengthened by the applicability of various transnational labour rights (vis-à-vis Greece's membership of the ILO, EU and Council of Europe). And yet, these rights did not prevent the multiple waves of EU/IMF-imposed domestic legislation from forcing an abrupt and deep transformation of the (pre-crisis) pro-worker identity of the Greek labour law into a new juridical nature of deregulation⁵ and individualisation.

While the literature on the crisis is rich in accounts of Greek labour law reforms,⁶ it has not devoted systematic attention to the constitutional dynamics behind the paradox. This article intends to address this deficit by adding two contributions to the existing literature. Firstly, it sets out a comprehensive analytical framework for mapping the process termed here as 'de-constitutionalisation' of collective labour rights. Secondly, it draws on the Greek experience as a case-study for generating reflections of relevance to the broader debate over the desirability of constitutionalising collective labour rights.

A preliminary issue concerns terminology. Unlike the much used term 'constitutionalisation', 'de-constitutionalisation' has not hitherto been used in labour law scholarship. This is unfortunate. We need a regressive term to describe the weakening or reversal of the process of labour constitutionalisation. De-constitutionalisation is thus defined as the situation *where constitutional or transnational labour rights fail to adequately perform their anticipated function in containing (or limiting) governmental, especially legislative, action.*

If constitutionalisation is understood as involving an 'attempt to *subject* all governmental action within a *designated field* [in our case this field is CLL] to the structures, processes,

⁵ Costas Papadimitriou, 'The Greek Labour Law face to the crisis: A dangerous passage towards a new juridical nature' (2013) ELLN Working Paper No. 3.

⁶ See *inter alia*, Aristeia Koukiadaki and Chara Kokkinou, 'Deconstructing the Greek system of industrial relations' (2016) 22(3) *European Journal of Industrial Relations* 205; Matina Yannakourou and Chronis Tsimpanis, 'Flexibility without Security and Deconstruction of Collective Bargaining: The New Paradigm of Labor Law in Greece' (2013-2014) 35(3) *Comparative Labor Law and Policy Journal* 331; Papadimitriou (ibid); Aristeia Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41(3) *ILJ* 276.

principles, and values of a “constitution”’,⁷ de-constitutionalisation is the opposite process of *releasing* CLL from constitutional constraints. It is thus close to the type of constitutional response to the crisis identified by Contiades and Fotiadou as ‘submission’. For them, submission refers to the situation when, ‘exposed to informal change brought about by the crisis-induced rule production, *some constitutions pathetically witness the erosion of their functions*’.⁸ As it is practically impossible to envisage any legislature formally amending the constitution so as to remove collective labour rights from the constitutional text, de-constitutionalisation is to almost invariably proceed via the dynamic mode of constitutional interpretation.

Following this clarification, let me now turn to the structure of the article. The analysis begins by introducing the constitutionalisation debate (*section 2*). Drawing on Eric Tucker’s seminal work on multi-level capital and labour constitutions in the Canadian context,⁹ it presents a triangular mapping of three normative spheres applying to the Greek case. The spheres are the (i) the transnational *capital* sphere, which relates to IMF-EU bailout conditionality; (ii) the transnational labour sphere; and (iii) the domestic labour sphere. After an overview of the Greek constitution and the austerity reforms (*section 3*), the analysis elucidates the interactions between the different spheres. More specifically, *section 4* examines the normativity and content of conditionality. It then proceeds to identify the process of the ‘aggressive internalisation’ of conditionality at the domestic level as the result of two movements: (i) the ‘capture’ of domestic legislation by conditionality, and (ii) the ‘incapacitation’ of the labour constitution as a consequence of the thin and deferential

⁷ Martin Loughlin, ‘What is Constitutionalisation’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford: OUP, 2010) 47 (emphasis in the original).

⁸ Xenophon Contiades and Alkmene Fotiadou, ‘How Constitutions Reacted to the Financial Crisis’ in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Farnham: Ashgate, 2013) 49.

⁹ Eric Tucker, ‘Labor’s Many Constitutions (and Capital’s Too)’ (2011-2012) 33(3) *Comparative Labor Law and Policy Journal* 355.

construction of the concepts of proportionality and public interest arrived at by the Greek Courts. The next section (*section 5*) focuses on the interaction between the transnational and domestic levels of labour regulation. It examines ILO jurisprudence, which has provided a partial but ‘soft’ cover to domestic labour law by criticising some of the austerity reforms. Then, it looks at case law of the Council of State (*Simboulis tis Epikrateias*), which has effectively blocked the application of ILO standards, and at pronouncements of ILO and other supervisory bodies on the state of the Greek legal order. The following section (*section 6*) takes notice of an absent interaction, namely between the transnational labour rights and conditionality within the EU sphere, which in effect immunises bailout conditionality from control by transnational labour rights. The final section (*section 7*) summarises the findings and contextualises Greek de-constitutionalisation in the broader constitutionalisation debate. While submitting that the Greek developments support the sceptical side of this debate, especially by providing a continental European confirmation of Tucker’s thesis, the article offers several new reflections of relevance to the constitutionalisation debate.

2. The ‘De-Constitutionalisation Triangle’: An Interactive Analytical Framework of Three Normative Spheres

For the purposes of establishing my analytical framework, it is necessary to introduce the labour constitutionalisation debate. Although the constitutionalisation of rights has been positively argued for in various national contexts,¹⁰ it is Ruth Dukes who has, more generally,

¹⁰ For the UK see K. D. Ewing, ‘Constitutional Reform and Human Rights: Unfinished Business?’ (2010) 5(3) *Edinburgh Law Review* 297; For a positive overview of South African constitutionalisation Dhaya Pillay, ‘The Constitutionalisation of Fair Labour Practices in South Africa’ (2004) NYLS Legal Studies Research Paper No. 04/05-13; For Canada see the account defending Court’s inclusion of the right to collective bargaining in the scope of freedom of association by Alan Bogg and Keith Ewing, ‘A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada’ (2011-2012) 33(3) *Comparative Labor Law and Policy Journal* 379.

called for a labour constitution¹¹ at domestic, regional¹² and global levels.¹³ For Dukes, though, constitutionalisation is ‘synonymous with the *legal* recognition of worker rights’.¹⁴ It may take the form of a constitutional entrenchment in a formal, written and normatively supreme constitution but does not need to. The constitutionalisation thesis, in so far as it is applied beyond the state to address ‘race-to-the-bottom’ pressures caused by globalisation, builds on the ‘labour rights as human rights frame’¹⁵ and the ambitious promise of a transnational integrated jurisprudence between the ILO, ECHR and EU.¹⁶

The constitutionalisation project, mainly in its conception as a normatively supreme constitutional entrenchment of collective labour rights, has attracted a multitude of sceptical accounts, notably from Judy Fudge, Harry Arthurs and Eric Tucker. Each of these accounts voices reservations on strategic and pragmatic grounds. They all doubt the practical effectiveness of constitutional arrangements in promoting labour interests. They do not question, in principle, the foundational status of labour rights for society.

More specifically, Fudge has given a balanced assessment of the perils and promises of constitutionalisation.¹⁷ But it is Arthurs and Tucker who, in the Canadian context, followed a distinct line of reasoning, in which this article aims to place itself. These authors advance a

¹¹ Ruth Dukes, *The Labour Constitution* (Oxford: OUP, 2014); Ruth Dukes, ‘Hugo Sinzheimer and the Constitutional Function of Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour law* (Oxford: OUP, 2011).

¹² Ruth Dukes, ‘The Constitutional Function of Labour Law in the European Union’ in Neil Walker, Jo Shaw and Stephen Tierney (eds), *Europe’s Constitutional Mosaic* (Oxford: Hart, 2011).

¹³ Ruth Dukes, ‘A Global Labour Constitution?’ (2014) 65(3) *Northern Ireland Legal Quarterly* 283.

¹⁴ Dukes, ‘Hugo Sinzheimer and the Constitutional Function of Labour Law’ (n 11) 62.

¹⁵ Virginia Mantouvalou, ‘Are Labour Rights Human Rights’ (2012) 3(2) *European Labour Law Journal* 151; see also Judy Fudge, ‘The New Discourse of Labor Rights: From Social to Fundamental Rights?’ (2007-2008) 29(1) *Comparative Labor Law and Policy Journal* 29 and, more generally, Philip Alston (ed), *Labour Rights as Human Rights* (Oxford: OUP, 2005).

¹⁶ See Virginia Mantouvalou ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ (2013) 13(3) *Human Rights Law Review* 529 and for the potential interactions between ILO, ECHR and the EU Alan Bogg, ‘*Viking and Laval*: The International Labour Law Perspective’ in Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Oxford: Hart, 2014).

¹⁷ Fudge, ‘Constitutionalizing Labour Rights in Europe’ (n 3).

distinct thesis. They point to material (economic or capital-based) constraints on the labour constitution, that is to say, restraints on its ability to confer real protections on workers. Arthurs exposes the primacy of the ‘real’ economic/political constitution (meaning the structure of the economy) over the formal-based constitution in the determination of labour and social rights.¹⁸ In a seminal contribution, Tucker develops this position. He argues for a multi-level mapping of ‘capital’ and ‘labour’ constitutions. His position can be summarised in three theses, both methodological and substantive. In terms of methodology, he called (a) for the rejection of the one-dimensional field of inquiry preoccupied only with labour constitutionalisation in favour of a two-dimensional field comparing capital and labour constitutionalisations¹⁹ and (b) a joint investigation of the different geographical levels (national, regional, international) where these constitutionalisations proceed.²⁰ In terms of substance, Tucker found a supremacy of capital over labour constitutionalisations, with the former enjoying a ‘thicker’ and ‘harder’ constitutionalisation (with the exception of Charter’s rights)²¹ than the latter at every level.

Taking its cue from Tucker, this article suggests a mapping of the Greek de-constitutionalisation process, one which is capable of registering the different levels of ‘capital’ and ‘labour’ constitutionalisation in the Greek case. The principal thesis to be developed is that Greek de-constitutionalisation should be understood as the cumulative outcome of a specific configuration of interactions (and non-interactions), synergistic and conflicting, within a triangle consisting of the following normative spheres.

The first is the sphere of *IMF-EU bailout conditionality* (‘conditionality’). It consists of the various conditions imposed on Greece in return for receiving financial assistance.

¹⁸ Harry Arthurs, ‘Labour and the “Real” Constitution’ (2007) 48(1-2) *Les Cahiers de droit* 43, 61-64; See also Harry Arthurs, ‘The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems’ (2010) 19(4) *Social & Legal Studies* 403.

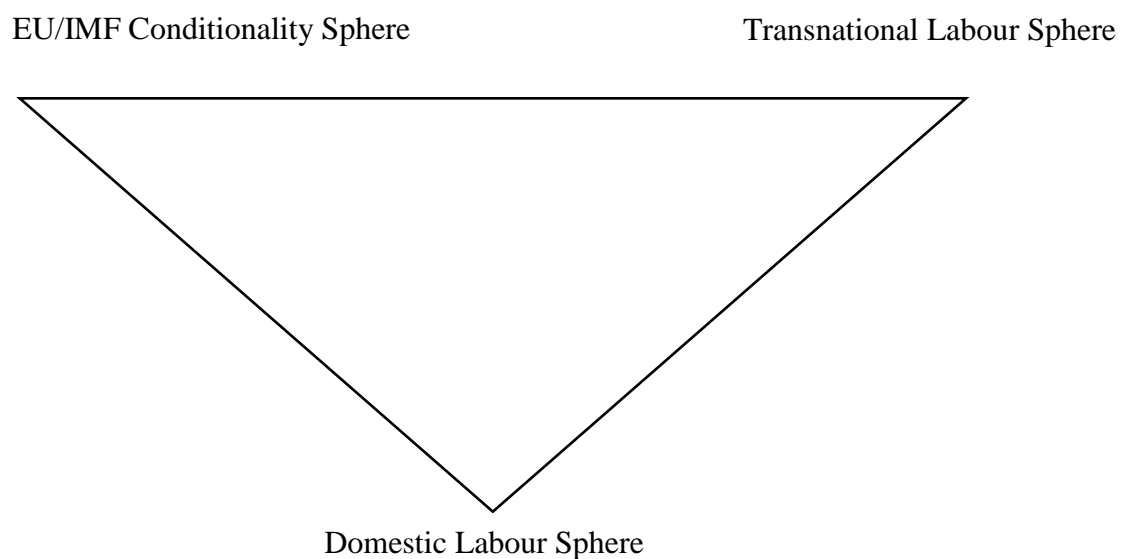
¹⁹ *Tucker* (n 9) 356.

²⁰ *ibid* 355-356.

²¹ *ibid* 374. In Tucker’s framework, ‘thickness’ refers to the substantive content of labour rights and ‘hardness’ to their enforceability (355).

Conditionality acts as an aggressive de-constitutionalising force. It seeks to annul the already limited effect of constitutionalised collective labour rights, so as to bring about the deconstruction of the domestic collective labour regime. By doing so, it tests the potency of the other two ‘defensive’ spheres: the domestic labour sphere and the transnational labour sphere. The former consists of domestic (constitutional and legislative) labour rights. The latter operates within three sites: (1) the ILO system of protection of labour rights, (2) the ECHR protection of labour rights through Article 11 (freedom of association),²² and (3) the EU labour rights scheme, mainly premised on the collective labour rights provisions of the EU Charter of Fundamental Rights (CFREU).

The Normative Spheres Triangle



Although this mapping does not include a domestic capital sphere as such, this is because (as shown below) the domestic capital sphere is represented, in the normative-constitutional plane, by the open-ended concepts of ‘proportionality’ and ‘public interest’.

²² Greece did not accept until recently (in Law 4359/2016) Articles 5 and 6 of the revised ESC.

3. Background: The Social-Democratic Constitution and an Overview of the Recent Reforms in Greece

The Greek Constitution is an example of what Ewing calls a ‘social-democratic’ constitution which is distinguished by its desire to regulate the imbalance in private law relationships and not just to control the exercise of public power as in the case of liberal constitutions.²³ It recognises collective autonomy, in relation to collective agreements and arbitration awards, as an autonomous normative source of general working conditions, supplementary to law;²⁴ imposes a duty on the state to ‘adopt due measures safeguarding the freedom to unionise and the unhindered exercise of related rights’;²⁵ and guarantees the right to strike.²⁶ This labour constitutionalisation resides in an overarching environment of a socially-committed market economy, recognising various social limitations to market freedoms and economic activity.²⁷

It was against this constitutional background that the austerity-led de-construction of CLL took place. It is beyond my aims to give a full account of the reforms, a task done elsewhere.²⁸ For present purposes, a brief summary suffices. Under the general aim of rendering labour relations as ‘decentralised and deregulated as possible’,²⁹ the following changes were made: the favourability principle between firm-level and sectoral-level agreements (previously favouring the employee by applying the most favourable provision in case of the concurrence

²³ K. D. Ewing, ‘Economic Rights’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP, 2012) 1037.

²⁴ Art. 22 par. 2.

²⁵ Art. 23 par.1.

²⁶ Art. 23 par. 2.

²⁷ E.g. Art.17(1) provides that property rights ‘may not be exercised contrary to the public interest’ and 106(2) that ‘private economic initiative shall not be permitted to develop at the expense of freedom and human dignity, or to the detriment of the national economy’.

²⁸ See n 6 above.

²⁹ Giorgos Katrougalos, *Η Κρίση και η Διέξοδος* (Αθήνα: Λιβάνης, 2012) 223 (in Greek).

of collective agreements of different levels) was suspended;³⁰ non-union ‘associations of persons’ were granted the power to conclude firm-level agreements in the absence of an enterprise union (now without the safety net of the favourability principle);³¹ the *erga omnes* extension of sectoral and occupational agreements concluded by employers’ associations representing the majority of workers in a given sector or occupation was suspended,³² exposing previously-covered workers to firm-level or individual bargaining; a number of statutory interventions invalidating or modifying the products of the instruments of collective autonomy (collective agreements and arbitration awards) were made;³³ minimum wage-setting was transferred from instruments of collective autonomy (national collective agreements) to the state;³⁴ and right of collective parties to have recourse to binding arbitration was changed from a unilateral to a consensual basis³⁵ (although this was reversed by Council of State decision 2307/2014).³⁶ The Syriza Government, elected in January 2015, ultimately reneged on its electoral pledge to restore the pre-crisis CLL regime, after its July 2015 capitulation to the lenders’ austerity demands.³⁷

³⁰ Art. 37(5) of Law 4024/2011.

³¹ *ibid* 37(1). These associations can be formed by a minimum of 60% of workers in the enterprise regardless of the total number of workers employed.

³² *ibid* 37(6).

³³ The most important are the reduction of the minimum-wage set by the 15.07.2010 National General Collective agreement (NGCA) by 22% (and 32% for young workers) (Art. 1(1) of Ministerial Council Act 6/2012 [MCA 6/2012], wage reductions up to 25% abolishing contrary provisions in arbitration awards/collective agreements in the public sector (Art. 2 of Law 3899/2010), invalidation of arbitration awards in the private sector prescribing any wage increases up to July 2011 or increases exceeding the NGCA rate until the end-2012 (Art. 51(1) of Law 3871/2010) and *retroactive* application of rules for the duration of collective agreement (to be compulsorily fixed terms and between 1-3 years) so that the end of existing collective agreements was legislatively determined against their own terms (Article 2(1-3) of MCA 6/2012).

³⁴ MCA 6/2012 set the minimum-wage during the crisis (Art. 1) and Law 4172/2013 (Art. 103) provided for a future mechanism of minimum wage determination by a Ministerial Decree to be applicable immediately after the conclusion of the program of fiscal consolidation. In the new framework, unions’ role will be merely consultative.

³⁵ Art. 3 of MCA 6/2012.

³⁶ Art. 4(3) of Law 4303/2014 implementing the Council of State Decision 2307/2014.

³⁷ Euro Summit, *Euro Summit Statement* (12.07.2015); For a critical analysis of Syriza’s capitulation see Stathis Kouvelakis, ‘Syriza’s Rise and Fall’ (2016) 97 *New Left Review* 45.

4. The ‘Strong’ Conditionality-Domestic Labour Sphere Interaction: A Case of Domestic Submission

This section examines the interaction between the EU/IMF bailout conditionality and the domestic labour sphere. This was by far the most active and powerful interaction in the triangle. Conditionality succeeded, to a large extent, in reshaping the domestic labour law sphere with its dictates. This section is divided into two subsections. The first traces the normativity and content of conditionality. The second locates the process of ‘aggressive internalisation’ of conditionality by the domestic labour sphere, as the result of two movements: (i) ‘capture’ of the domestic legislative layer by conditionality and (ii) incapacitation of the labour constitution by the judicial construction of the ‘public interest’ and the proportionality test.

4.1 The ‘De-Constitutionalising’ Force of the IMF-EU Bailout Conditionality: Its Dual Normativity and ‘Dominium’

The EU-IMF bailout conditionality was incorporated in the various Memoranda concluded by the Greek State with the EU institutions and IMF (as creditors or on behalf of creditors)³⁸ and

³⁸ The Greek Government concluded the first Memoranda (May 2010) with the European Commission acting on behalf of the Eurozone Member States (Memorandum of Understanding between the European Commission acting on behalf of the Euro Area Member States and the Hellenic Republic), and the IMF (IMF, Greece: Request for Stand-By Arrangement, Memorandum of Economic and Fiscal Policies, Memorandum on Understanding on Specific Economic Policy Conditionality [*Memorandum I*]). Available at <http://www.imf.org/external/pubs/ft/scr/2010/cr10111.pdf> (all page numbers cited in this article are from this source). For the second bailout programme (March 2012), the Greek Government concluded a Memorandum with the European Commission (again acting on behalf of Eurozone Member States) (Greek Government, Memorandum of Understanding between the European Commission acting on behalf of the euro area members and Hellenic Republic), and the IMF (IMF, Greece: Letter of Intent, Memorandum of Economic and Financial Policies and Technical Memorandum of Understanding [*Memorandum II*]). Available at <https://www.imf.org/external/np/loi/2012/grc/030912.pdf> (all page numbers cited in this article are from this source). The third Memorandum (August 2015) was concluded between the Greek Government and the European Commission acting on behalf of the European Stability Mechanism (ESM) (Greek Government, The European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and Bank of Greece) [*Memorandum III*]. Available at https://ec.europa.eu/info/sites/info/files/01_mou_20150811_en1.pdf (all page numbers cited in the article are from this source)

the Council Decisions on the Excessive Deficit Procedure under the EU law.³⁹ Conditionality emerged out of the *ad hoc* hybridisation of the IMF and EU layers in the context of the crisis measures for addressing the Eurozone debt crisis. In a sense, it mediated between the *material* and the *legislative*, that is between the urgent material needs of the Greek State to refinance its public debts and its legislative sphere of norm-production. Unlike an instance where the material exerts its influence on the legislator through a pure material effect (for example, recession or unemployment), conditionality construed a *sui generis* mediating normative structure, produced by the osmosis of the EU, Eurozone and IMF layers.

The issue of the normativity of conditionality, that is whether it gives rise to any legally binding obligations, can be captured only upon identifying its *dual* sources: (i) the ‘soft’ form of Memoranda of Understandings (MoUs) and the (ii) ‘hard law’ of EU Council decisions under the Excessive Deficit Procedure (Article 126(9) TFEU).

MoUs constitute the clearest instrumental embodiment of conditionality. In general, and unless the parties agree otherwise, Memoranda are not legally binding as such under international law⁴⁰ and function more as ‘political commitments’.⁴¹ For the first Greek Memorandum, this position was affirmed by a Greek Council of State (STE) decision to the effect that the Memorandum was a program of a government policy and not an international agreement.⁴²

³⁹ See Art. 2 par.3 (c-d) of Council Decision 2010/320/EU and Art. 2 par. 3(z) of Council Decision 2011/734/EU (recast), both referring explicitly or implicitly to CLL reforms. For a recent update, see Council Decision 2015/1410/EU.

⁴⁰ Malcolm Shaw, *International Law* (Cambridge: 6th edn, CUP, 2008) 906.

⁴¹ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: 3rd edn, CUP 2013) 28, and in general see 28-54.

⁴² Council of State, Decision 668/2012 para. 28. This is the dominant view in literature, see *Katrougalos* (n 29) 177-180 and Kostas C. Chrysogonos and Georgios D. Pavlidis, ‘The Greek Debt Crisis: Legal Aspects of the Support Mechanism for the Greek Economy by Eurozone Member States and the International Monetary Fund’ in Aristidis Bitzenis, Ioannis Papadopoulos and Vasileios A. Vlachos (eds), *Reflections on the Greek Sovereign Debt Crisis: The EU Institutional Framework, Economic Adjustment in an Extensive Shadow Economy* (Cambridge: Cambridge Scholars Publishing, 2013) 281-287; and for a discussion of different views Aristeia

Notwithstanding their ‘soft’ nature, Memoranda were remarkably effective in altering domestic legislation. Why? This is because the existence (or not) of a legal duty to observe the conditions is of secondary importance. The extreme level of material dependence of the conditioner-receiver (Greek state) on the vital default-preventing resources to which these conditions were attached, coupled with the perceived danger of leaving the Eurozone and the non-existence of alternative sources of funding, ensured perfect compliance with the ‘obligation to legislate X’, as specified in the Memoranda.

Here, Daintith’s distinction between *imperium* and *dominium* as techniques of government⁴³ may be helpful for an understanding of the nature of conditionality. For Daintith, *imperium* is the ‘government’s use of the *command of law* in aid of its policy objectives’, whilst *dominium* is the ‘employment of the *wealth* of government for this purpose’.⁴⁴ Applied to our case, the MoU could be said to have constructed a powerful ‘*dominium over imperium*’ insofar as the wealth is used for securing the enactment of specific legislation by the Greek state (*imperium*). The ‘dominium reading’ of conditionality secures a more accurate understanding of conditionality, in that it is sensitive to the actual power disequilibrium between the parties. In consequence, the Greek MoUs typified a regime of what Chorev and Babb call ‘management of resource dependence’, that ‘is a *latent* form of coercion’ appearing ‘to be compatible with the modern norm of formal equality’.⁴⁵

One of the main features of this dominium over imperium imposed by the Memoranda was its temporal continuity. Continuity was ensured by the continuous supervision process

Koukiadaki, *Can the austerity measures be challenged in supranational courts? The cases of Greece and Portugal* (Brussels: ETUC, 2014) 12-17.

⁴³ Terence Daintith, ‘The Techniques of Government’ in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (Oxford: 3rd edn, Clarendon Press, 1994).

⁴⁴ *ibid* 213 (emphases in quotations added).

⁴⁵ Nitsan Chorev and Sarah Babb, ‘The Crisis of Neoliberalism and the Future of International Institutions: A Comparison of the IMF and the WTO’ (2009) 38(5) *Theory and Society* 459, 480 (emphasis in the original).

undertaken by the so-called Troika.⁴⁶ The latter was the *ad hoc* body consisting of representatives of the IMF, European Commission and ECB. The Troika negotiated as a consortium with high-level Greek government officials. From this negotiation process emerged the conditions set out in the Memoranda along with and the terms setting out inspections and reviews for determining compliance with conditionality. These functions formed part of Troika's overall mandate to deliver a report to the lenders, namely the IMF and Eurogroup (and later the ESM). The influence of the Troika report cannot be overstated. A European Parliament report characteristically noted with concern the admission by the Eurogroup's President that 'the Eurogroup endorsed the recommendations of the Troika without extensive consideration of their specific policy implications'.⁴⁷

The second source of conditionality was 'hard law'. It followed from the inclusion of certain Memoranda conditions into EU Council Decisions on specific deficit-reduction actions⁴⁸ to be taken within a specific time-limit by a country that 'persists in failing to put into practice the Recommendation of the Council'.⁴⁹ These Decisions – and arguably the Memoranda with the European Union institutions having as a foundation these decisions- fall within the 'hard law' forms of the Excessive Deficit Procedure (EDP) mechanism. They were issued by the Council acting upon recommendations made by the Commission. In effect, these decisions performed the task of the formalisation and legalisation of conditionality by embedding them in the 'hard law' fiscal part of the formal EU architecture.

⁴⁶ From January 2015, the Troika became a quartet with the addition of a representative from the European Stability Mechanism. The article keeps the terminology Troika as almost all labour law legislation considered were enacted before this change.

⁴⁷ European Parliament, Committee on Economic and Monetary Affairs, *Report on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries* 2013/2277 (INI) 28 February 2014, par. 52

⁴⁸ See n 39 above.

⁴⁹ Art. 126(9) of TFEU.

To summarise, the normativity of conditionality can be illustrated with the metaphor of a prism: the same obligation, depending on the instrumental medium, comes out in dual ‘hard’ (Council Decisions) and ‘soft’ (Memoranda) law colours. The soft law aspect, though, was in reality more effective than the hard aspect. The reason for this was its attachment to *dominium*. The latter was *the* critical gradient, giving conditionality its strength.

4.2 Conditionality as Transnational Capital Sphere

In this sub-section, the analysis moves on from the form and normativity of conditionality to its content. It argues that EU/IMF conditionality should be seen as a *transnational capital sphere*. This sphere developed out of the synchronisation of the evolutionary paths of two processes of capital constitutionalisation, namely the IMF (international level) and the EU’s (or Eurozone’s) macro-economic constitutionalisation. The resultant synergy was responsible for the neo-liberal and de-regulatory substance of the transnational sphere of conditionality.

On the IMF, to say that it engages in neo-liberalisation promoting capital interests is hardly controversial. The institution, at least since the 1980s, promotes extreme de-regulatory labour law policies through its structural conditionality programmes under a technocratic, monetarised and neo-liberal paradigm.⁵⁰ Tucker is right to consider IMF as a ‘neoliberal constitutional project’ belonging to capital constitutions.⁵¹

⁵⁰ For IMF and neo-liberalism see Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* (London: 2edn, Zed Books, 2009) and Julie L. Mueller, ‘The IMF, Neoliberalism and Hegemony’ (2011) 25(3) *Global Society* 377.

⁵¹ *Tucker* (n 9) 369-370.

Regarding the EU, the capital-orientated nature of conditionality can be understood only against the backdrop of the evolution of the so-called ‘European economic constitution’.⁵² Kaarlo and Klaus Tuori have observed during the crisis a central mutation within the EU’s economic constitution from the dominance of the micro-economic layer (fundamental freedoms, free competition) to that of the macro-economic layer, directed towards attaining fiscal targets and objectives.⁵³ Indeed, the ‘macro-economic constitution’ was subjected to an intense constitutionalisation during the crisis,⁵⁴ prioritizing fiscal discipline and fiscal consolidation as overriding constitutional objectives. For CLL, this shift precipitated major consequences. In the presence of the IMF which has consistently put CLL structural reforms in its conditionality, the European Economic Constitution extended its material scope (despite Article 153(5) TFEU)⁵⁵ to treat collective labour law de-construction as a requisite concretisation of its fiscal and economic aims. A clear imperialist dynamic of the economic constitution towards CLL and the social policy field in general could be detected.⁵⁶

In this environment, conditionality emerged as the product of the normative constellation that sprang from the neo-liberal alignment of the process of European integration, Eurozone integration and IMF governance in the face of the crisis. The plurality of its institutional architecture should not detract our attention from its singularity, in terms of substance. All provisions could be easily summarised as imposing a single duty on the Greek state to de-

⁵² See Wolf Sauter, ‘The Economic Constitution of the European Union’ (1998) 4(1) *Columbia Journal of European Law* 27.

⁵³ Kaarlo Tuori and Klaus Tuori, *The Eurozone crisis: a constitutional analysis* (Cambridge: CUP, 2014) Part II.

⁵⁴ See further Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The constitutionalization of European budgetary constraints* (Oxford: Hart 2014) and Lukas Oberndorfer, ‘A New Economic Governance through Secondary Legislation?’ in *Crisis and Collective Labour Law in Europe* (n 4).

⁵⁵ This article excludes the EU competence for ‘pay, the right of association, the right to strike or the right to impose lock-outs’.

⁵⁶ For the impact on labour law see Catherine Barnard, ‘The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective’ (2012) 41(1) *ILJ* 98; For the impact on social policy see Francesco Costamagna ‘The Impact of Stronger Economic Policy Co-ordination on the European Social Dimension: Issues of Legitimacy’ in *The constitutionalization of European Budgetary Constraints* (n 54).

construct its protective CLL system as a means of bringing about ‘internal devaluation’,⁵⁷ increasing competitiveness and ensuring fiscal consolidation. Under an exclusively fiscal conception of labour law, these conditions marked the ‘triumph of neoliberalism and of the economic over the social conception [of labour law]’.⁵⁸ And in effect, conditionality promotes capital interests by diluting the protective character of domestic collective labour law and freeing employers from restraints. However, the distinctive feature of conditionality is that its normative influence does not derive from its formal normative supremacy but from its ability to fully capitalize on the *dominium* of the state for imposing its rules.

At this point, let me consider two possible counter-arguments to my thesis.⁵⁹ The first would challenge the characterisation of the EU’s macro-economic layer as ‘capital’ and not ‘economic’ constitutionalisation. This is because it is guided by macro-economic imperatives which are distinct, at least formally, from capital rights. While this may be formally true, it is essential that our understanding of the macro-economic constitution is not co-opted by accepting its claims for distinctiveness at face-value. The claim to neutral macro-economic goals may be nothing more than a mask, which has the effect, of promoting more effectively the rights of capital. Indeed, a qualitative assessment of its objectives and policies would suggest a one-sided orientation towards capital right. For instance, let us take the goal of ‘competitiveness’. This aim is not as class-neutral as its proponents claim to be. This is because the metric of what counts as ‘success’ in this competition, in its exclusive focus on business needs and profits, naturally favours and registers the interests of those who own the sources of profit and production, namely capital. The same applies to the related aim of ‘labour unit cost

⁵⁷ Klaus Armingeon and Lucio Baccaro ‘Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation’ (2012) 41(3) *ILJ* 254.

⁵⁸ *Papadimitriou* (n 5) 4.

⁵⁹ I would like to thank the two anonymous reviewers for raising these points and Quentin Detienne for pressing me on the issue of competitiveness and capital interests.

reduction'. This epitomises a capital-oriented understanding of workers. Workers are seen as a *cost to production* to be reduced, and not as the *creators* of wealth. A second counter-argument may object to the broader characterisation of the EU project, and especially the Eurozone, as irremediably committed to a capital constitutionalisation process. This is a good point. It leads me to clarify the argument to avoid misunderstandings. Whilst I side with the literature recognising the primacy of capital freedoms over social rights within the EU, as well as perceiving its evolution as capital-friendly neo-liberalisation,⁶⁰ the position I have developed can still be accepted if one adheres to the following less demanding proposition. This is that the current macro-economic framework as interpreted by the European institutions represents a form of neo-liberalism,⁶¹ which principally registers capital interests. Having said that, in no way should this claim be taken as one taken as meaning that the EU is *irreversibly* committed to this process. After all, my general understanding of constitutionalisation/de-constitutionalisation as a dynamic process means that there is no such thing as irreversible constitutionalisation/de-constitutionalisation.

Having engaged with these helpful counter-arguments, let me now move to consider how this 'dominium over imperium' entered the domestic labour sphere.

4.3 The 'Aggressive' Internalisation of Bailout Conditionality in the Domestic Labour Sphere

Conditionality, especially as expressed in the Memoranda, introduced a foreign and unconventional layer into the domestic legal order. Its declared purpose was to deconstruct the

⁶⁰ For the primacy of the economic over the social constitution see *Tuori and Tuori* (n 53) 231-241; For EU as capital-friendly neoliberalisation see Stephen Gill, 'European governance and new constitutionalism: Economic and Monetary Union and alternatives to disciplinary Neoliberalism in Europe' (1998) 3(1) *New Political Economy* 5 and Bastiaan Van Apeldoorn, Henk Overbeek and Magnus Ryner, 'Theories of European Integration: A Critique' in Alan W. Cafruny and Magnus Ryner (eds), *A Ruined Fortress?: Neoliberal Hegemony and Transformation in Europe* (Lanham: Rowman & Littlefield, 2003).

⁶¹ *Oberndorfer* (n 54) and K.D. Ewing, 'The Death of Social Europe' (2015) 26(1) *King's Law Journal* 76.

Greek worker-protective structures of collective labour law. In a sense, this conditionality-induced legislation appeared as a kind of ‘transplant’. And interestingly, the domestic order accepted the transplant, in a process termed here as ‘aggressive internalisation’. This process took place via a double parallel movement, each subjugating the legislature and judiciary respectively: (a) the ‘capture’ of the legislative layer and (b) the ‘incapacitation’ of the defensive (or limiting) function of the labour constitution.

4.3.1 The ‘Capture’ of the Legislative Layer: The Meta-Legal Function of Conditionality

In its first movement, conditionality captured the legislative layer. Most conditions embodied an ‘obligation to legislate’, disguised as a free commitment of the Greek Government to enact a specific legislation by a specified date. From a formal-legal viewpoint, though, conditionality (and the dominium) is hardly detectable in the Greek legal order. After all, it is a legislative act of *imperium*, a sovereign and formally free act of the Greek Parliament, which enacts the conditionality reforms. Memoranda as such, as discussed earlier, evade legal recognition. In this sense, I talk about their *meta*-legal function. Memoranda set the programmatic framework for the laws that implement them. Nonetheless, owing to the power of dominium, this meta-function attained a high level of effectiveness. It achieved the full capture of the legislative layer. The result is a kind of ‘sham legislation’. The Greek legislator is forced to introduce laws by economic necessity and external imposition.

It is telling that, even when the Syriza Government came to power (in January 2015) pledging the restoration of the pre-crisis CLL scheme, the dominium ensured the uninterrupted maintenance of the legislative capture. Following an initial standstill provision in February 2015, barring Greek authorities ‘from any rollback of measures and unilateral changes to the policies and structural reforms that would negatively impact fiscal targets, economic recovery

or financial stability, as assessed by the institutions’,⁶² the third Memorandum contained a clause that prohibited any ‘return to past [labour market] policy settings which are not compatible with the goals of promoting sustainable and inclusive growth’.⁶³ Crucially, it is the lender institutions, enjoying the upper hand of dominium, that are to make these assessments. This third Memorandum was signed in August 2015, under the most acute influence of dominium, as a consequence of bank capital controls⁶⁴ and resource asphyxiation for the Greek state.⁶⁵

4.3.2 Public Interest and Proportionality: The Transmission Belt of Conditionality into the Domestic Constitutional Labour Layer

In its second movement, conditionality targeted the constitutional layer. It aimed at the functional incapacitation of the domestic labour constitution, meaning that the latter could not assert its hierarchical supremacy over the captured legislative layer. In order to break down the limiting function of the domestic labour constitution, conditionality used the open-ended, ‘elastic’ concepts of ‘public interest’ and ‘proportionality’ as transmission belts.

(i) The *Prima Facie* Conflict Between Conditionality-Driven Legislation and the Domestic Labour Constitution

Considering the breadth and the far-reaching nature of the de-constructive reforms of CLL, it may be easily suggested that the reforms imposed multi-faceted *prima facie* restrictions on collective autonomy and collective bargaining. For reasons of space we cannot examine each

⁶² Eurogroup, *Statement on Greece* (20.02.2015).

⁶³ *Memorandum III* (n 38) 22.

⁶⁴ The ECB’s decision to cap the emergency liquidity assistance (ELA) to Greek banks has led to the imposition of capital controls. ‘Greek crisis: banks to close on Monday and capital controls imposed after ECB caps funding at current levels’ *Telegraph* (28 June 2015) <http://www.telegraph.co.uk/finance/11704054/Greece-crisis-live-banks-to-close-on-Monday-and-capital-controls-imposed-after-ECB-caps-funding-at-current-levels.html> (accessed on 01.06.2017).

⁶⁵ The freezing of disbursements under Memoranda II caused the Greek default on IMF See Press Release, *Statement by the IMF on Greece* (30.06.2015) <https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr15310> (accessed on 12.11.2016). The previous disbursement was given to Greece on 13.08.2014.

measure here. It is sufficient for present purposes to note that even the Council of State (STE), which declared all Memorandum II CLL measures coming before it to be constitutional (with the exception of the reforms to arbitration), conceded that they ‘restrict the field of collective autonomy’.⁶⁶ So, our attention should move to the critical instrument of proportionality deciding whether these *prima facie* restrictions are justified.

(ii) The ‘Thin/Deferential’ Construction of Proportionality Review

Within the Greek constitutional order,⁶⁷ the principle of proportionality determines the constitutionality of restrictions on constitutional rights. While judicially recognised since 1984 as an unwritten constitutional principle,⁶⁸ Article 25(1) of the Constitution (as revised in 2001) expressly provides that ‘[constitutional] restrictions of any kind... should respect the principle of proportionality’. In broad terms, the principle requires for any measure to pursue a legitimate public aim or public interest, be suitable and necessary for the intended purpose, and not to violate the minimum core of the right.⁶⁹

In the crisis context, the Greek Government and the Council of State’s case-law have adopted what could be termed as a ‘thin’ fiscal/deferential construction of the proportionality review. The latter consists of two components: (a) a narrow ‘fiscal/economic’ conception of public interest and (b) judicial deference towards the government and the legislator.

⁶⁶ Council of State, Decision 2307/2014 para. 23.

⁶⁷ According to the Greek system of diffuse constitutional review, every court has the power to examine the unconstitutionality of legislation. However, in practice, the most important judgments come from the supreme Courts of the civil law/criminal law (Areios Pagos) and of the public law branches (*Council of State* [Simvoulitis Epikrateias]).

⁶⁸ Council of State, Decision 2112/1984; For the historical evolution of the principle see Stylianos-Ioannis G. Koutnatzis, ‘The Proportionality Principle in Greek Judicial Practice’ (2016) 16(2) *Diritto & Questioni Pubbliche* 205, 212-218.

⁶⁹ See in general, Koutnatzis (ibid), and Antonis Chanos, ‘New Constitutionalism and the Principle of Proportionality: The Case of the Greek Constitution’ (2016) 16(2) *Diritto & Questioni Pubbliche* 191.

The government's invocation of the public interest of economic survival constitutes a mantra in every piece of legislation introducing memoranda-dictated CLL reforms. For example, when justifying the Law 3845/2010 Memorandum I measures, after outlining the fiscal targets, the government underlined that 'while painful', '[t]he [measures] are necessary for the protection of the paramount public interest'.⁷⁰ Similarly, for Law 4046/2012 (Memorandum II), the government invoked the public interest of staying in the Eurozone as a justification for the measures⁷¹ while noting that the survival of the country, in the context of the most serious economic crisis that the country confronted in its recent history, dictates the regaining of fiscal balance and fiscal surpluses as a concretisation of the public interest.⁷² In his speech to the Ministerial Council, the Prime Minister Lucas Papademos stated that the program (Memorandum II) and the accompanied financial assistance are necessary conditions for the protection of national interests.⁷³ He also stressed that while they are 'exceptionally painful' they are less painful than the consequences of the alternative, that is debt default and expulsion from the Eurozone.⁷⁴ From these statements, the Government's exclusive *fiscal* conception of the public interest is clearly visible.

Moving to the judicial terrain, the focus should be placed on two landmark judicial decisions of the Council of State, namely decision 668/2012 pronouncing the 'fiscal/deferential' doctrine and decision 2307/2014 upholding the constitutionality of all Memorandum II measures, with the exception of the arbitration reforms.

⁷⁰ Government, Explanatory Note on Law 3845/2010 (in Greek).

⁷¹ Government, Explanatory Note on Law 4046/2012 1 (in Greek).

⁷² *ibid.*

⁷³ Prime Minister Lucas Papademos, *Speech in the Ministerial Council* (*Ethnos*, 10.02.2012) http://www.ethnos.gr/politiki/arthro/papadimos_ektos_kybernisis_opoios_den_psifisei_to_mnimonio_kapoio_i_adynatoun_na_sikosoun_to_baros_tis_diasosis-63615222/ (accessed on 01.07.2017)

⁷⁴ *ibid.*

Decision 668/2012 of the Council of State, while not directly concerned with collective labour rights, set the tone for the ‘fiscal/deferential’ construction of proportionality towards all of the austerity-imposed measures. In dismissing the claim that the cuts violated Article 1(1) of the First Protocol of ECHR on the right to peaceful enjoyment of property, the Court reasoned that they were justified as parts of a broader programme aimed at ‘covering the economic needs of the country and the improvement of its fiscal and economic situation, that is to facilitate aims of serious public interest that are, simultaneously, aims of common interest of Eurozone member-states’.⁷⁵ The Court thus stated that it would apply a ‘marginal review’ of the contested measures. Only measures ‘*profoundly unsuitable*’ for attaining the pursued aims would be declared unconstitutional.⁷⁶ In this fashion, the Court killed two birds with one stone, with the effect of clearing the path for a deferential attitude towards the legislator. Firstly, the marginal review, ‘employed a reversal of the burden of proof, stating that it is up to the rights claimants to show evidence that the legislator took into consideration the wrong elements and facts in drafting the measures under review’, thereby ‘free[ing] the legislator from the obligation to justify measures infringing fundamental rights’.⁷⁷ Additionally, the ‘en bloc’ treatment of all measures as part of a program that is necessary for the realisation of the paramount public interest lowered the justificatory hurdle for the legislator in proving that the measures are necessary (this refers to the ‘necessity stage’ of proportionality). Instead of demonstrating the necessity of each measure, *individually* compared with other less restrictive alternatives capable of achieving the same aim, the legislator is required to merely show that

⁷⁵ Council of State, Decision 668/2012, para. 35.

⁷⁶ *ibid* (emphasis added).

⁷⁷ Xenophon Contiades and Ioannis A. Tassopoulos, ‘The Impact of the Financial Crisis on the Greek Constitution’ in *Constitutions in the Global Financial Crisis* (n 8) 207.

the *programme* to which all the measures are contained is necessary, with such determination being only subject to ‘marginal review’.⁷⁸

The 2307/2014 Council of State’s ruling essentially applied this ‘thin’ construction of proportionality to the issue of collective autonomy. Although the Court recognised that the reforms ‘restrict the field of collective autonomy’ and ‘constitute a serious decline of workers’ rights and a respective weakening of their position vis-à-vis employers’,⁷⁹ it continued by observing that these measures were part of the broader set of Memoranda conditions. Subsequently, it drew attention to four factors that rendered these conditions compliant with the marginal constitutional review. Firstly, it referred to the fiscal aims of the Memoranda, including those of reducing labour units and increasing competitiveness.⁸⁰ Secondly, the Court pointed out that these measures were undertaken under the exceptional circumstances of a threatening debt default and the collapse of the national Greek economy with unpredictable economic and social consequences.⁸¹ Here we can see how ‘dominium’ (the use of resources to force legislation)⁸² and the emergency rationale are constitutionally acknowledged. They shape the public interest element of the proportionality review, with the effect of releasing constitutional constraints on the reform legislation. Thirdly, the technical capacity of the Memoranda to achieve their stated aims was held to lie beyond the scope of judicial review.⁸³ Finally, the restrictions were regarded as not violating the minimum core of the right to collective autonomy ‘since the basic institutions of collective autonomy are maintained, thus giving employees the chance to fight for the amelioration of their position and for the alleviation of the adverse consequences of the economic crisis and of the contested measures’.⁸⁴

⁷⁸ Council of State, Decision 668/2012, para. 35.

⁷⁹ Council of State, Decision 2307/2014 para. 23

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² See section 4(1) above.

⁸³ Council of State, Decision 2307/2014 para. 23

⁸⁴ *ibid.*

Evidently, the Council of State adopted a minimalist version of the minimum core. It is hardly an exaggeration to state that only a blanket prohibition of collective agreements can fall within the minimum core as determined by the Court. This approach is consistent with the pre-crisis jurisprudence of the Greek Courts, where it was held that the constitutional right of collective autonomy imposes on the legislator only a duty not to ‘*fully weaken* the institution of collective autonomy’,⁸⁵ but without explicitly mentioning the minimum core.

As an exception to its generally deferential attitude, the Council of State ruled that the arbitration reforms (the elimination of unilateral recourse to arbitration and the legislative restriction of its scope to basic wages and four types of occupational benefits) were unconstitutional. This conclusion was justified on two grounds. The first was textual. The constitutional provision reads: ‘[g]eneral working conditions shall be determined by law, supplemented by collective labour agreements concluded through free negotiations and, in case of the failure of such, *by rules determined by arbitration*’.⁸⁶ For the Court, this phrasing would be meaningless if it was referring to a consensual recourse to arbitration that was to be permitted anyway as an expression of the collective autonomy of the parties.⁸⁷ In addition, the Court took the view that the constitutional text left absolutely no doubt that it precluded the substantial restriction of the permissible object of arbitration only to basic wage.⁸⁸ The other reason was *teleological*. The Court emphasised that the aim of the constitutional provision on arbitration was to ‘preserve the social peace by preventing the irresolution of disputes and ensuring a *balanced*, as far as possible, resolution of disputes’.⁸⁹ Allowing either party to frustrate the resolution of disputes at a collective level by rejecting recourse to arbitration could have led to two outcomes, both contrary to these aims: ‘the determination of terms and

⁸⁵ Council of State, Decision 632/1978 (emphasis added).

⁸⁶ Article 22(2).

⁸⁷ Council of State, Decision 2307/2014 para. 32.

⁸⁸ *ibid* 33.

⁸⁹ *ibid* 32.

conditions by the individual contractual negotiations, in a context where the employer is usually the superior party’;⁹⁰ ‘or a regulatory gap, perpetuating the uncertainty and the conflict between the social partners’.⁹¹

(iii) Public Interest and Proportionality: The Transmission Belts of Conditionality and Dominium

The concepts of ‘public interest’ and ‘proportionality’ functioned as transmission belts, by which bailout conditionality and dominium were injected into the domestic constitutional layer. A deeper examination reveals that the domestic constitutional layer, although formally independent of the bailout-conditionality normative sphere, was colonised by the transnational sphere of conditionality. The following interactions could be located, evidencing the framing of proportionality under the transnational normative sphere of conditionality.

Firstly, the transnational dimension becomes clear, as long as one is attentive to the *derivative* dimension of the public interest invoked. Instead of assessing each measure’s intrinsic ability to foster a particular economic aim, the determinative factor for the Court was their ‘en bloc’ attachment as conditionality to an external loan assistance program providing the requisite financial resources. In a sense, public interest *equates with a blind general interest to preserve the dominium imposed by conditionality*.

Secondly, repeated judicial references to the Eurozone and EU context of the obligation to undertake fiscal consolidation enabled the ‘hard law’ light of the EU macro-economic constitution to penetrate, through the public interest, the domestic constitutional order. To quote the Council of State, national fiscal and economic consolidation purposes ‘constitute

⁹⁰ *ibid.*

⁹¹ *ibid.*

aims of common interest for European Member States, *taking into account the EU law obligation of fiscal discipline and maintenance of Eurozone stability in total*'.⁹² This statement does not only mean that the fiscal conception of public interest, as adopted by the Council of State, replicates the European macro-economic *fiscal* constitutional template. The judicially-crafted deference to the government's determination of the capacity of each measure has a more serious implication. It means that the controversial assumptions of the EU's macro-economic constitution, positing the de-regulation of labour law as the only effective instrument for achieving competitiveness and growth, remain unchecked. In this way, the Council of State granted immunity to the *fiscal* constitution. This immunity is a result of the transformation of the 'necessity stage' requirements of the proportionality review: from one requiring *specific* justification for each measure, compared to less intrusive alternatives, to a *general* justification.⁹³

The third level of interaction is much subtler. All CLL reforms had a macro-economic dimension. They were directly linked with the emerging EU macro-economic constitution. This link made more difficult the judicial review of proportionality. How was it possible for the Court to make an assessment on whether CLL reforms contributed to the stated quantitative aims of competitiveness, reduction of labour unit costs and public deficits? In their seminal analysis, Kaarlo and Klaus Tuori argue that the macro-economic constitution 'is less susceptible to juridification' than the microeconomic constitution based on legal freedoms (e.g. free movement, competition law).⁹⁴ This is because, although the macro-economic constitution is premised on *exact* aggregate economic values and policies (e.g. targets and deficits), 'the attainment or non-attainment of these objectives depends on a great number of individual

⁹² Council of State, Decision 668/2012, para. 35 (emphasis added).

⁹³ See Georgios Kassimatis, 'Τα αντισυνταγματικά μέτρα των δανειακών συμβάσεων. Οι βασικές θέσεις της απόφασης 668/2012 της Ολομέλειας του ΣτΕ' (2012) 60(10) *Νομικό Βήμα* 2648, 2671-2673 (in Greek).

⁹⁴ *Tuori and Tuori* (n 53) 39.

policy decisions and external factors which simply cannot be exhaustively regulated by law'.⁹⁵ Indeed, this effect of the macro-economic orthodoxy is visible in the Court's approach to proportionality. It may account for the 'fiction of necessity' through which the Court may have tried to escape this hurdle, by deferring to the government's and Memorandum's assessment of the positive effect of the measures to the stated fiscal aims and the absence of less restrictive measures. When the government was asked to justify the economic desirability of measures, it merely pointed to the Memoranda. Fourthly, as we discuss below, the rules of the transnational labour normative sphere (ECHR, ILO) play absolutely no part in framing the analysis of proportionality, even while enjoying a supra-legislative status, according to the constitution. The *transnationalisation* of proportionality review concerns only conditionality.

(iv) Domestic Courts and Proportionality Review: An Indirect Challenge to the Hierarchy of Norms

The Greek judiciary, at least in the decisions we are concerned with here, opted for a deferential stance to the legislator at the expense of securing the constitutional labour rights, with the exception of arbitration. The Courts have thus been complicit in the crisis's de-construction of CLL. This judicial behaviour may have been motivated by an institutional unwillingness to be involved in a highly-charged political and economic environment, with Greece's and (potentially) the Eurozone's survival at stake. The Court's anxiety not to be accused of engaging in what could be termed 'mega-politics' (matters of outright and utmost political significance)⁹⁶ by derailing the reforms may have led to judicial restraint. A different, more normative motivation, may defend the Court's 'thin' approach as required by the principle of

⁹⁵ *ibid.*

⁹⁶ Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93.

separation of powers. Venizelos makes this exact point. He argues that public interest, in common with other such open-ended legal notions, is in fact a ‘rul[e] of distribution of powers between the legislator and the judge, between the political and judicial power’.⁹⁷ If one accepts this perspective, the entire discourse becomes one of comparative institutional analysis. When asking which institution is better equipped to deal with the complex economic and financial issues arising from the crisis, this approach replies that the executive branch of government is the best-placed institution. This is for two reasons. Firstly, the government has the technical administrative capacity to address these issues in a systematic and positive way, particularly in light of their predominantly fiscal nature. Secondly, the executive branch is vested with the constitutional responsibility to ‘define and direct the general policy of the country’.⁹⁸

Whilst these arguments are not wholly without merit, it is difficult to reconcile the thin approach of the Court with the spirit and purpose of constitutional rights. Its major weakness concerns the construction of the public interest. As the public interest is a concept which is *internal* to the constitution, it cannot be defined in purely fiscal terms. Instead, it should integrate social considerations and conform to the constitutionally-guaranteed socially-committed market economy.⁹⁹ Consequently, respect for collective labour rights should be *part* of the public interest, never antithetical to it. They are fundamental for the social orientation of the economic system and the socially-committed nature of the economy. In addition, since limitations on rights should be a matter of last resort and narrowly interpreted, there should be a ‘thicker’ proportionality review. This is the very essence of the necessity test within the concept of proportionality. The practical consequence of a ‘thick’ review is the dismissal of

⁹⁷ Evangelos Venizelos, ‘Εθνικό Σύνταγμα και εθνική κυριαρχία υπό συνθήκες διεθνούς οικονομικής κρίσης’ in Xenophon I. Contiades, Filippou K. Spiropoulos and Konstantinos Tsoukalas (eds), *Δημοκρατία, Σύνταγμα, Ευρώπη στην εποχή της κρίσης* (Αθήνα: Σαβάλλας, 2012) 32 (in Greek).

⁹⁸ Art. 82 of the Greek Constitution.

⁹⁹ See *Kassimatis* (n 93) 2661 [‘the criteria for the existence or not of public interest are constitutional’] and Dimitris Travlos-Tzanetatos, *Εργατικό Δίκαιο και Πολιτική* (Αθήνα: Αντ.Ν.Σάκουλας, 1986) 85 [‘on the need to re-constitutionalise public interest’] (both sources in Greek).

the ‘fiction of necessity’ of the ‘en bloc treatment’ of the legislative provisions set out in the Memoranda. Each measure would then need to be individually justified as necessary for attaining the public interest. By rejecting a ‘thicker’ approach, the Greek courts engineered a *de facto* modification of the hierarchy of constitutional norms within the domestic order. This confirms Gerapetritis’ observation that economic crises cause a deregulation of the hierarchy of sources of law.¹⁰⁰

To conclude, the discussion in this section has mapped the process of the incapacitation of the protective function of the labour constitution which arose from the Court adopting a ‘thin’ approach to proportionality review. This process enabled conditionality to maintain the capture and de-construction of CLL.

5. Interactions Between the Transnational and Domestic Labour Spheres: A ‘Weak’ Synergy

Did the transnational labour sphere rescue the domestic labour constitution by enhancing its defensive function, as anticipated? Whilst the ECHR is *normatively* applicable,¹⁰¹ the European Court of Human Rights has issued no pronouncement on the Greek CLL case.¹⁰² The ILO is the only transnational organization which has developed an extensive jurisprudence on Greek collective labour law developments. In this section, the analysis critically assesses the relevant

¹⁰⁰ Giorgos Gerapetritis, ‘Η οικονομική κρίση ως στοιχείο απορρύθμισης της ιεραρχίας των πηγών του δικαίου: Νομοτέλεια η άλλοθι;’ (2012) 60(10) *Νομικό Βήμα* 2754 (in Greek).

¹⁰¹ See n 2 above.

¹⁰² It is worth mentioning that the European Committee on Social Rights, the supervisory body of the ESC has found some conditionality-imposed as contrary to the ESC [*General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v Greece*, Complaints No. 65/2011 and 66/2011]. However, as they concern individual employment law (and not Art. 6) they are outside of the scope of the present article. See further Olivier De Schutter, *The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights* (Study for the Committee on Constitutional Affairs, European Parliament 2016). Available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf) 32-39.

ILO jurisprudence, before turning to the Council of State's 2307/2014 decision blocking its internalisation in the domestic legal order.

5.1 The International Labour Layer: the ILO on the Greek CLL Crisis Reforms

The ILO jurisprudence on Greek reforms is found in the annual observations of the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts), and in the conclusions of the ILO's Committee on Freedom of Association (CFA) on the complaint submitted by the Greek trade unions, which alleged multiple violations of the ILO standards on freedom of association arising from austerity reforms.¹⁰³

Whilst the CFA expressed its awareness 'that the measures giving rise to this complaint have been taken within a context qualified as grave and exceptional, provoked by a financial and economic crisis',¹⁰⁴ four principal areas of legislative activity were considered to raise issues of compliance with ILO standards. Firstly, the ILO issued frequent pronouncements on the social dialogue deficits in the Greek case. It appears to suggest a 'social dialogue standard' imposing a procedural, deliberative obligation on Government to conduct a 'full and frank consultation'¹⁰⁵ with social partners prior to the passage of the crisis measures on collective bargaining. More specifically, in 2011, the Committee of Experts expressed with 'deep concern' its 'deep regret' that 'such far-reaching changes were made without full and thorough discussions with all the social partners concerned'.¹⁰⁶ Similarly, the CFA urged that 'permanent and intensive social dialogue be held on all issues raised in the complaint'.¹⁰⁷ This dialogue did

¹⁰³ CFA, Conclusions on Case No. 2820 (Greece) in 365th Report of the Committee on Freedom of Association (1-16 November 2012).

¹⁰⁴ *ibid* 988.

¹⁰⁵ Committee of Experts, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, (2011) 100th Session ILC.100/III/1A 83.

¹⁰⁶ Committee of Experts, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, (2012) 101st Session ILC.101/III/1A 161.

¹⁰⁷ CFA, *Conclusions* (n 103) 989.

not materialise.¹⁰⁸ Secondly, regarding the multiple state interventions in the area of collective autonomy, the CFA in repeating previous jurisprudence was clear that they could ‘prove harmful and destabilize labour relations’, as ‘depriv[ing] workers of a fundamental right and means of furthering and defending their economic and social interests’.¹⁰⁹ Thirdly, the legislation giving to non-union ‘associations of persons’ the power to conclude firm-level agreements in the absence of an enterprise trade union was regarded by the CFA as a measure that ‘may seriously undermine the position of trade unions as the representative voice of the workers in the collective bargaining process’.¹¹⁰ The CFA underlined the point that the Greek Government ‘does not contend that such associations can be considered to be trade unions with full functions and guarantees of independence.’¹¹¹ Finally, the CFA understood the suspension of the favourability principle between firm and sectoral agreements as irreconcilable with the principle that all parties should be bound by voluntarily agreed provisions,¹¹² as well as an constituting an obstacle for industry-level collective bargaining.¹¹³

However, the ILO’s criticism was only *partial*. Three crisis measures were deemed compliant with ILO standards. The first is the elimination of the *erga omnes* extension of sectoral agreements, in respect of which the CFA observed that ‘there is no duty to extend agreements from the perspective of freedom of association principles’.¹¹⁴ The second is the reduction of the after-effect period of collective agreements from six to three months. The CFA found no violation of the principles of free collective bargaining, but attempted to qualify this finding by observing ‘that it comes within an overall context where imposed decentralization

¹⁰⁸ For *Memorandum I* (n 38) there was no social dialogue. For *Memorandum II* (n 38) there was dialogue but the Memorandum stated that it ‘fell short of expectations’ and suggested unilateral imposition (75). See further Eleni Patra, ‘Social dialogue and collective bargaining in times of crisis: The case of Greece’ Working Paper 38 (Geneva: ILO, 2012).

¹⁰⁹ CFA, *Conclusions* (n 103) 995.

¹¹⁰ *ibid* 998.

¹¹¹ *ibid*.

¹¹² *ibid* 997.

¹¹³ *ibid*.

¹¹⁴ *ibid* 999.

and weakening of the broader framework for collective bargaining are likely to leave workers with no minimum safety net for their terms and conditions of work'.¹¹⁵ Finally, the CFA adhered to its long-standing jurisprudence demanding the elimination of the unilateral recourse to arbitration as contrary to the voluntary nature of collective bargaining and thereby raising problems with Convention 98,¹¹⁶ other than in the context of essential services in the strict sense of the term.¹¹⁷ It now repeated its jurisprudence on this point and recognised that the 'measure was taken in an effort to align the law and practice with its principles relating to compulsory arbitration'.¹¹⁸

These ILO observations have a profound implication. They give rise to a partial 'conflict of obligations' for the Greek legislator. The Greek Parliament is forced to adopt the very CLL legislative reforms that are interpreted as a violation of its international labour obligations. It is true, of course, that the ILO's supervisory bodies perceived these violations as concerned with the relationship between domestic legislation and international labour norms. Yet in reality, they gave rise to a clash of ILO standards with EU/IMF bailout conditionality.

The major problem, though, is the lack of effective means of enforcement for ILO standards and of effective sanctions for non-compliance. As Ewing remarks, 'the supervision and enforcement of international labour standards relies on the *goodwill* of governments to abide by obligations voluntarily entered into and ultimately on moral persuasion by the international community'.¹¹⁹ To quote Birk, 'the real purpose of asserting that national substantive law does not comply with ILO standards is simply to heighten trade union pressure on the national

¹¹⁵ *ibid* 996.

¹¹⁶ CFA, *Conclusions* on Case No. 2261 (Greece) in 332nd Report of the Committee of Freedom of Association (November 2003) 665.

¹¹⁷ *ibid* 667.

¹¹⁸ CFA, *Conclusions* (n 103) 1000.

¹¹⁹ K.D. Ewing, *Britain and the ILO* (London: 2nd edn, Institute of Employment Rights, 1994) 14 (emphasis added). For the effectiveness of international labour standards see Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart, 2005) Ch 2.

legislator indirectly via the ILO'.¹²⁰ For Greece, however, even this pressure is not available. The legislature is captured by the *dominium* of IMF-EU conditionality and is thereby unresponsive to domestic social pressures. In addition, unlike the soft-law Memoranda, ILO norms lack any institutional mechanism akin to *dominium* for their effectiveness. They are not part of conditionality. Consequently, the enforcement of ILO norms and their penetration into the domestic normative sphere is fully dependent on the Member States' domestic legal system and their use by domestic judicial actors.

5.2 The Lack of Internalisation of the Transnational Labour Sphere in the Domestic Labour Sphere: The Council of State 2307/2014 Decision

Ratified ILO Conventions have a formal supra-legislative status within the Greek constitutional order.¹²¹ And yet, the Council of State, in its 2307/2014 ruling, blocked the internalisation of the transnational labour sphere via this route.

The Court divided allegations that CLL reforms conflicted with transnational labour sphere norms into two categories. In the first, the Court examined the allegations that the CLL reforms violated Article 11 of the ECHR (freedom of association) and the European Union freedoms of trade union rights, collective autonomy and right to strike. In the Court's view, these allegations were unfounded. This was because the (Memorandum II) CLL provisions, 'considered in their entirety, neither violate the minimum core of labour rights and right to strike, collective autonomy, and trade union freedoms in general, nor restrict those rights so as to lead to a violation of proportionality'.¹²² The ambiguity of this pronouncement cannot be overstated. The Court seemingly suggests that satisfying the domestic constitutional review of proportionality is sufficient for compliance with the respective transnational proportionality

¹²⁰ Rolf Birk cited in Alfred Wisskirchen, 'The standard-setting and monitoring activity of the ILO: Legal questions and practical experience' (2005) 144(3) *International Labour Review* 253, 271.

¹²¹ Art. 28 par.1.

¹²² Council of State, Decision 2307/2014 para. 40.

tests (EU, ECHR or both).¹²³ Hence the subordination of proportionality to bailout conditionality achieves two effects simultaneously: it both internalises bailout conditionality and prevents the internalisation of the transnational (EU, ECHR or both) normative layers.

The second category contains claims of infringement of ILO Conventions 87 and 98 and of the European Social Charter. Aligning its view with previous jurisprudence, the Court not only ignored the CFA conclusions on the Greek case but relegated the Conventions' status to mere recommendations to the ratifying countries. And it even suggested that the content of Conventions 87, 98 and 154, as well as that of the ESC, were fully realised by the enactment of Greece's constitution. In turn, this meant that, since no violation of the domestic constitution (besides arbitration) was found in this case, no conflict with these Conventions arose.¹²⁴ One could immediately discern the paradox here: while the protective domestic labour constitution is functionally incapacitated by proportionality, it is still used as a justification for disabling the effect of ILO norms.

6. Interaction Between Conditionality and Transnational Labour Spheres: A Notable Absence

The third interaction is conspicuous in its absence. There has been no meaningful pattern of interaction between bailout conditionality and the transnational labour sphere. Rendered possible by the EU involvement in both spheres, this link carried immense potential. It offered an avenue for blocking the bailout conditionality at its source, by preventing the EU condition-setting institutions from prescribing de-constructive reforms for the CLL in conflict with transnational labour rights. The centre of reference for this interaction, and the 'gateway' through which ILO and ECHR norms could penetrate into the EU sphere, is the EU Charter of

¹²³ The Court describes the EU and ECHR claims as only allegations. In the next sentence referring to why these allegations are inadmissible, the Court does not specify which normative sphere(s) are *prima facie* applicable.

¹²⁴ Council of State, Decision 2307/2014 para. 40.

Fundamental Rights ('CFREU'). The latter sought to 'constitutionalise the European Social Model'¹²⁵ by including within its scope references to freedom of association (Article 12), collective bargaining and strike (Article 28) and was granted primary EU law status by the Lisbon Treaty.

The experience of the Greek crisis suggest that the Charter will not live up to its promise for 'a renewal of labour law'.¹²⁶ Conditionality operates in a *de facto* environment of institutional immunity, leading to the emergence of what Solomon calls 'responsibility gaps' of EU institutions with respect to their human rights obligations.¹²⁷ The shadow operation of Troika and the crafting of bailout conditionality within extra-EU and informal channels are essential for evading the control by the EU transnational labour sphere.

Two levels of in-existent interactions could be located: (a) formation of conditions, (b) review/oversight of conditions. The membership of Troika, the primary condition-setting body, does not include the ILO, the Council of Europe or any other more socially-oriented institution as members. Rather the Troika's contains a monetarist institution (the ECB) and a neo-liberal institution (the IMF) alongside the European Commission (and later the ESM). Thus it is hardly surprising that CLL questions were approached as 'macro-economic rigidity' issues and not from a 'rights-based' perspective. There also exists no institutional 'screening process' capable of examining the compatibility of conditions with the transnational labour rights, or at the very least a consultation with the ILO and other social policy bodies.¹²⁸ Having said that, in the third Memorandum (August 2015), there was a provision for a Group of Experts,

¹²⁵ A.C.L Davies, *EU Labour Law* (Cheltenham: Edward Elgar, 2012) 20-24.

¹²⁶ Brian Bercusson, 'Preface' in Brian Bercusson (ed), *European Labour Law and the EU Charter of Fundamental Rights* (Baden-Baden: Nomos 2006) 13.

¹²⁷ Margot Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21(4) *European Law Journal* 521.

¹²⁸ See European Parliament resolution of 13 March 2014 on Employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries 2014/2007(INI) 'The [Committee] regrets ... the fact that the ILO was not consulted [when the austerity programmes were designed]' para. 3.

including the ILO, to ‘review a number of existing labour market frameworks, including collective dismissal, industrial action and collective bargaining’.¹²⁹ This may be a step towards providing some sort of re-balancing by integrating some social input. The actual impact of the published report criticising most of the reforms¹³⁰ in the actual negotiations is yet unclear.

As for the oversight level, there is an absence of meaningful political oversight by the European Parliament¹³¹ or effective judicial oversight on conditionality. The CJEU has foreclosed the routes of challenge to conditionality-imposed national legislation based on the Charter by finding the relevant preliminary references inadmissible.¹³² It also dismissed any jurisdiction to annulment claims for the Memoranda concluded by the European Commission under the ESM.¹³³ Here it is important to clarify that our focus is on the actual lack of institutional pronouncements and not on the otherwise perfectly arguable position that the Memoranda violate the EU law and the EU Charter.¹³⁴

This absence of a transnational link between bailout conditionality and transnational labour spheres is causally connected to de-constitutionalisation, since conditionality was left to proceed unhindered with the ‘aggressive internalisation’ in the domestic labour sphere examined in Part 4.

¹²⁹ *Memorandum III* (n 38) 21.

¹³⁰ See Recommendations of the Expert Group for the Review of Greek Labour Market Institutions (27 September 2016) available at <http://www.ieri.es/wp-content/uploads/2016/10/Final-Report-Greece-September-2016.pdf>.

¹³¹ Since January 2016, there is a European Parliament Financial Assistance Group monitoring the financial assistance programs supported by the ESM. However, its powers are essentially procedural (e.g inviting Members of the State and Commission) and the institution does not take part directly in the decision-making or the implementation of the programmes or control them otherwise.

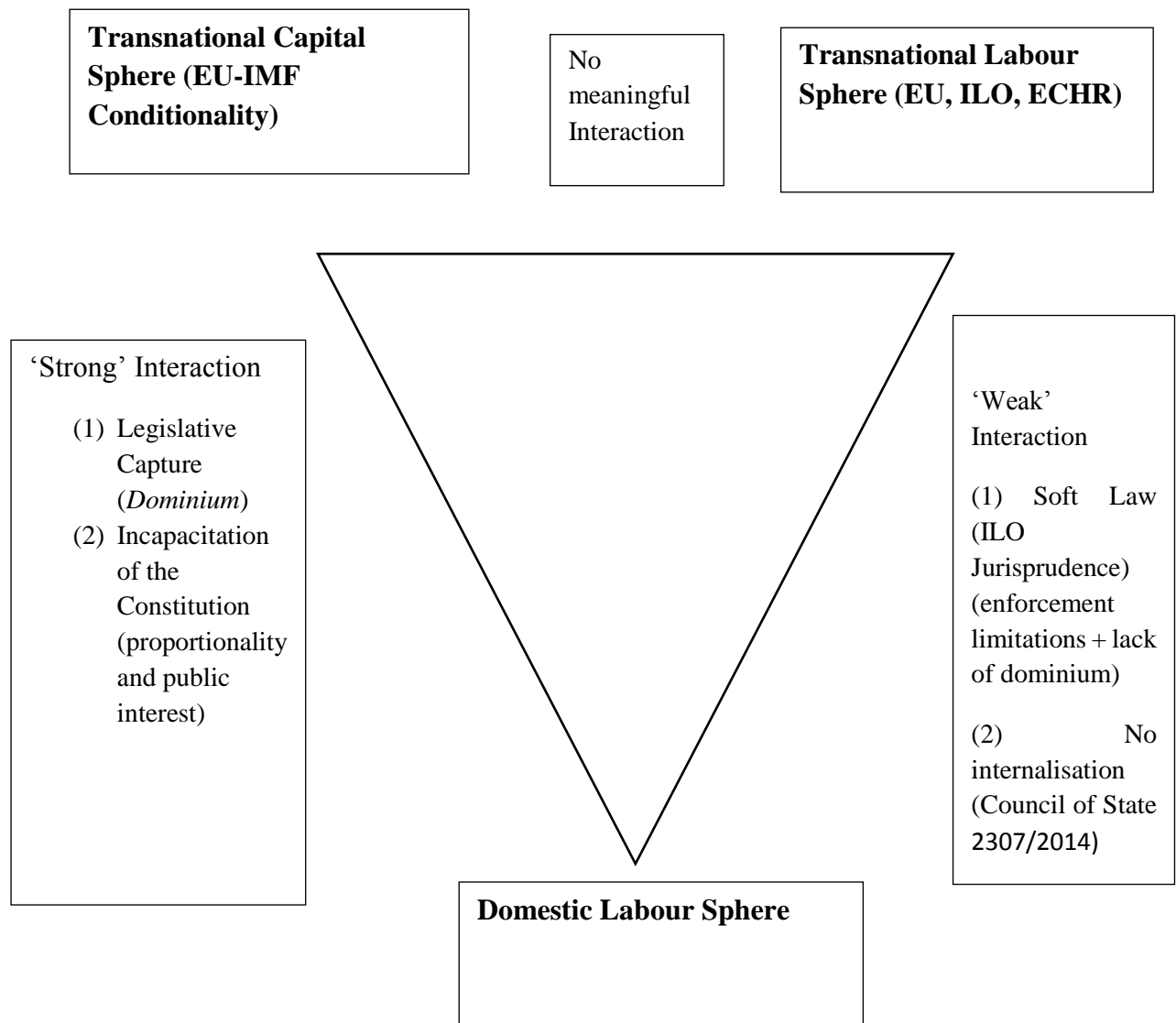
¹³² See e.g CJEU, C-434/11 *Corpul National al Politistilor v Ministerul Administratiei si Internelor (MAI) and Others* [2011] Order of 14 December 2011 and CJEU, C-128/12 *Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios* Order of 7 March 2013.

¹³³ CJEU, Joined Cases C-8/15 P to C-10/15 P. *Ledra Advertising v European Commission and European Central Bank* (20 September 2016) para. 54.

¹³⁴ Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* (Baden-Baden: Nomos, 2014).

7. Greek De-Constitutionalisation in Context: Concluding Reflections

Only when all ‘triangular’ interactions are pieced together, is it possible to grasp the de-constitutionalisation process in its entirety and complexity. This is the sum total of the set of interactions (and non-interactions): (1) the ‘aggressive internalisation’ of conditionality in the domestic labour sphere by legislative capture (through dominium), and the incapacitation of the containment function of the domestic labour constitution (by proportionality/public interest); (2) the weak interaction between the domestic and transnational labour spheres; (3) the absence of interaction between conditionality and the transnational labour sphere.



Stripped to its bare essentials, the Greek experience raises the following constitutional variant of the familiar problematic of juridification for labour law:¹³⁵ is constitutionalisation, as a normatively supreme form of juridification, a secure outlet for a worker-protective collective labour law? Greece may be a single case, but its significance may be said to exceed national boundaries and particularities for three reasons. Firstly, it is one of the first case studies involving in such an explicit manner a ‘global’ multi-level clash of capital and labour constitutionalisations. This clash tests the effectiveness of labour rights in the most paradigmatic manner. This is especially important at a time where hopes are increasingly pinned on labour rights, mostly transnational ones, for reorienting collective labour law in a more worker-protective direction. Secondly, unlike other instances where it has been necessary to derive, in a formal-nominalist way, a right of collective bargaining and right to strike from freedom of association, Greece is a country that has been already there. It has a social-democratic constitution and an express scheme of constitutionalised labour rights. Thirdly, the Greek case is notable because, notwithstanding the intensity of the deconstruction process, labour rights defences were not adequately triggered.

Let me now advance several broader concluding reflections from the Greek de-constitutionalisation in the context of the broader constitutionalisation debate.

Firstly, Greek developments appear to vindicate Tucker’s methodological thesis, suggesting the need for a joint investigation of capital and labour constitutionalisation at all levels. A complete account of the Greek developments requires a consideration of all levels of interaction, that is to say, both the transnational and national ones. In addition, the ‘triangular’ mapping of spheres has shown that the Greek case contains a conflict between a ‘capital’ and

¹³⁵ See Spiros Simitis, ‘Juridification of Labor Relations’ in Gunther Teubner (ed), *Juridification of social spheres* (Berlin: de Gruyter, 1987).

‘labour’ constitutionalisation, consistent with Tucker’s bifurcation. This conflict becomes manifest as soon as bailout conditionality is understood as the product of the synergy between the IMF’s capital constitutionalisation and the EU’s neo-liberal constitutionalisation, and proportionality conceived as the functional instrument of the domestic capital constitution.

Secondly, the Greek case accords with Tucker’s substantive thesis, postulating the supremacy of capital over labour constitutionalisations. In Greece, this supremacy found expression in the asymmetric *clash* between the capital and labour normative spheres. It is asymmetric, since its result is the *double* submission of the labour spheres. This submission occurs in two distinct sites: those of (i) the domestic legislator and (ii) the EU. Domestically, even though the labour rights sphere departs from a position of superiority as a consequence of the constitutional status of collective labour rights and the supra-legislative status of transnational labour rights, labour rights are defeated by conditionality. The constitutional hierarchy, a major attraction for constitutionalisation, does not hold. It is de facto subverted by proportionality. The latter immunises the legislative layer from constitutional limitations, so as to integrate the de-constructive conditionality for CLL into the domestic legal order. At the EU level, the labour rights sphere starts from a position of pragmatic inferiority, yet formal equality. On the one hand, it is well-documented that the social constitution is the ‘eternal loser’ to the economic constitution within the EU sphere.¹³⁶ Bruun talks about the marked contrast between the ‘EU’s labour is a market commodity on the internal market approach’ with the ILO’s ‘labour is not a commodity’ approach.¹³⁷ This is despite the vesting of labour rights, via the Charter, with primary law status as a result of the Lisbon Treaty. In Greece, the final outcome aligns with pragmatic and not formal-legal expectations. Capital constitutionalisation

¹³⁶ Tuori and Tuori (n 53) 231-241.

¹³⁷ Niklas Bruun, ‘Protection of Established Position, Normative Incoherence and the Changing Normative Field of Labour Law’ in Ann Numhauser-Henning and Mia Rönömar (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Oxford: Hart, 2013) 93.

prevails over labour constitutionalisation. What is perhaps more interesting is the mode of victory for the capital constitution. It is a consequence of the unchecked status of the capital constitutionalisation by labour constitutionalisation, and not of the primacy of the fundamental freedoms over collective labour rights as was the fear of labour scholars after the Viking/Laval judgments.¹³⁸

Thirdly, the analysis in this paper has revealed the extreme asymmetry in the effectiveness and coherence of the capital sphere in relation to the labour spheres. The international (IMF) and regional (EU, Eurozone) capital constitutionalisations have achieved an effective *fusion*, in the specific form of bailout conditionality. By doing so, they exhibit innovation and dynamism in bypassing their own normative constraints and in promoting the interests of capital. In instrumental terms, the powerful gradient of *dominium* solidifies a soft law basis (Memoranda) with the hard law cover of Council Decisions. In stark contrast, the international (ILO) and regional (EU, Council of Europe) labour rights layers cannot achieve a similar fusion; instead they are kept distinct. Alongside a coherent, integrated and powerful transnational/European capital sphere is an incoherent, fragmented and weak transnational labour sphere deprived of any institutional transmission mechanism with meaningful effect. ILO pronouncements have, at best, soft law obligations for the Greek state, while transnational labour norms cannot influence the domestic labour sphere. Hepple's comment that 'social rights are like paper tigers, fierce in appearance but missing in tooth and claw'¹³⁹ is fitting here.

In turn, this reflection provides a set of further reflections for the constitutionalisation debate. It calls for Tucker's framework to be adapted to give a more prominent space to the *interactive* side of various constitutionalisations. More attention should be paid to the specific geography,

¹³⁸ See A.C.L Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37(2) *ILJ* 126.

¹³⁹ Bob Hepple, 'Enforcement: the law and politics of cooperation and compliance' in Bob Hepple (ed), *Social and Labour Rights in a Global Context* (Cambridge: CUP, 2002) 238.

form and nature of *clashes* between capital and labour constitutionalisations. Tucker might have correctly dismissed previous accounts as one-directional, in that they solely focus on labour constitutionalisation. However, his account does not systematically engage with the clashes that may lead to the effective de-constitutionalisation of the labour sphere. This is where the Greek case could be helpful. It shows how the supremacy identified by Tucker materialises in terms of instruments. Consequently, it is erroneous to conceive the levels and types of capital and labour constitutionalisation as static categories. Instead, they should be conceived as *processes*, fusing and interacting, in synergistic and conflicting configurations.

Fourthly, Tucker's category of hard/soft law may not be analytically central. The Greek Constitution possesses a hard quality, but its containment function was seriously undermined by the 'soft law' Memoranda.¹⁴⁰ And, formally, in Greece the ILO Conventions were 'harder' (supra-legislative status) than the Memoranda-inspired legislation. Notwithstanding the soft nature of capital constitutionalisations compared to the labour ones at both domestic and EU levels,¹⁴¹ their effectiveness was in inverse proportion to their formal normative effect. The Memoranda were not legally binding as such but achieved efficiency high level of effectiveness due to their association with much-needed material sources (dominium) and a subservient judiciary and legislator. So, the Greek case contributes a cautionary note for the use of hard/soft law categories. It suggests, more generally, that the fault lines should be on the *effectiveness/non-effectiveness* of measures.

Moreover, the Greek story may be of relevance to the discourse on the possibility of transplantation of collective labour law rules. In his article 'On Uses and Misuses of Comparative Law', Otto Kahn-Freund was highly sceptical of this possibility. For him,

¹⁴⁰ To be sure, the Council of EU Decisions were hard but in reality the soft Memoranda were actually the effective instruments where conditionality was produced and negotiated.

¹⁴¹ Within the EU, labour rights have a primary status (pursuant to the Charter's treaty effect) whilst Memoranda are, at best, secondary law as Council Decisions.

specific, nation-bound socio-political structures and power relations render collective labour relations resistant to transplantation.¹⁴² Coming from a different theoretical perspective (systems theory), Gunther Teubner has generally argued that transplants are ‘irritants’ for the domestic system, so that the (foreign rule) ‘is an outside noise which creates wild perturbations in the interplay of discourses within these [domestic] arrangements and *forces them not only to reconstruct internally their own rules but to reconstruct from scratch the alien element itself*’.¹⁴³ Assuming that one understands conditionality as imposing the transplantation of a de-regulated and de-centralised system of collective bargaining,¹⁴⁴ the Greek experience seems to negate rather than confirm these theses. This is because, to put it in terms of Kahn-Freund’s metaphor, it was the ‘organism’ (Greek CLL and Constitution) that adapted to the transplant (conditionality) and not vice-versa. Conditionality, as the transplant, succeeded in deconstructing the worker-protective orientation of the Greek CLL. It is also difficult to see any major reconstruction of conditionality by the domestic system along the lines suggested by Teubner, at least in terms of substance. This failure of re-construction of the alien element may be explained by the Troika keeping a tight grip on the legislative process. Under the permanent threat of the sanction of withdrawal of financial resources, it guaranteed that the domestic legal system could not be used to reconstruct the ‘transplant’ in a manner contrary to its de-constructive purposes.

An additional reflection draws attention to the jurisprudence of the Greek courts. The latter exhibits a double pattern of general deference and selective activism. The Courts allow the state virtually unrestrained leeway to enact austerity legislation and to intervene in collective

¹⁴² Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37(1) *Modern Law Review* 1, 21.

¹⁴³ Gunther Teubner, ‘Legal Irritants: How Unifying Law Ends Up in New Divergences’ in Peter A. Hall and David Soskice, *Varieties of Capitalism: the Institutional Foundations of Comparative Advantage* (Oxford: OUP, 2001) 418 (emphasis added).

¹⁴⁴ Already in 2011, ILO observed that reforms are introduced ‘in a manner which seems to be disconnected from Greek realities’ (para. 302) *Report on the High Level Mission to Greece* (Athens, 19-23 September 2011).

autonomy in ways that, by the Court's own admission, restrict the field of collective autonomy¹⁴⁵ and weaken the position of labour.¹⁴⁶ This leeway is provided by tweaking the doctrinal tool of proportionality to effectively eliminate the stage of 'necessity' whilst adopting a minimalist version of the minimum core of the right. However, the arbitration reforms attracted different treatment. For them, and unlike other reforms, their inclusion in the Memoranda did not allow similar leeway for the legislator. This approach arguably resonates with Sinzheimer's scholarship. As Dukes reminds us, Sinzheimer advocated a position that initially seemed contradictory. He simultaneously argued for the *secondary* role of law to autonomous norms but also defended the state's *primacy* in collective labour relations in the last instance, meaning that the state should have the right to intervene in the economy and be the ultimate guarantor of public interest.¹⁴⁷ Sinzheimer's view is close to the approach of the Greek Court. It could be argued to give some backing to the deferential construction to proportionality justified by the invocation of extraordinary emergency conditions. Although in normal times, subsidiarity may be preferable, in exceptional times the constitution, this position would reason, should be elastic so as to permit the state to intervene in the public interest. However, there is an exception. The Court defends institutional barriers against a non-collectivist market resolution of disputes, where the employer is the dominant party, by defending unilateral recourse to arbitration (contrary to the Memoranda and the ILO pronouncements). While the state can restrict collective autonomy, for the Court the market determination of terms and conditions of wages is still a less desirable prospect, to be avoided. This judicial approach, however, suffers from a major defect. It is blind to the function of 'proportionality' and public interest as, effectively, instruments of the domestic capital constitution.

¹⁴⁵ Council of State, Decision 2307/2014, para. 23

¹⁴⁶ *ibid.*

¹⁴⁷ Dukes, *The Labour Constitution* (n 11) Ch 2 especially 23-25.

Finally, the Greek de-constitutionalisation serves a pointer to the perils of open-ended concepts, such as proportionality, for the constitutional operation of collective labour rights. Davidov has recently advocated for the use of open-ended standards as adaptable and malleable.¹⁴⁸ The risk here is not intrinsic in the concepts themselves, but in the way they are used within a constitutional ordering: they give a broad normative flexibility to the state to bypass constitutional restraints whilst keeping up a pretence of adherence to the constitutional legality. This normative flexibility is problematic for labour law when the state is captured by capital interests (if we assume that it operates in a capitalist economy). And, if one agrees with any sort (Marxist or not) of thesis which sees the state a biased towards capital, this type of capture is not infrequent.¹⁴⁹ Hence Greek developments should caution against nominalist accounts focusing on the formal constitutionalisation of collective labour rights and ignoring the risks of open-ended concepts.¹⁵⁰ The invocation of proportionality was sufficient to alter the social-democratic balance, built into the Greek constitutional scheme of socially-committed market economy, towards capital rights.

Put in the broader picture, the Greek constitutionalisation suggests that the added value of the ‘social-democratic’ over the ‘liberal constitution’¹⁵¹ is in constant flux. Dukes and Christodoulidis perceive constitutionalisation as a choice made by a state over what ‘ought to be rigid and what flexible’.¹⁵² And yet, after examining the Greek case, one could only wonder about what is rigid in the labour constitution. In a sense, the Greek tale exposes the dark side of constitutionalisation. It would be a grave error to think that the latter is an irreversible

¹⁴⁸ Guy Davidov, *A Purposive Approach to Labour Law* (Oxford: OUP, 2016) Ch. 7.

¹⁴⁹ See Bob Jessop, *State theory: Putting the capitalist state in its place* (Cambridge: Polity Press, 1990); Ralph Miliband, *The State in a Capitalist Society* (London-New York: Quartet Books, 1973) and Nicos Poulantzas, *State, Power and Socialism* (London: Verso, 1980).

¹⁵⁰ For the proportionality perils in the ECHR context see Lord Wedderburn ‘Freedom of association or right to organise?’ (1987) 18(4) *Industrial Relations Journal* 244.

¹⁵¹ For the distinction see Ewing, ‘Economic Rights’ (n 23).

¹⁵² Emiliós Christodoulidis and Ruth Dukes, ‘Introduction: Labour, Constitution and a Sense of Measure’ (2010) 19(2) *Social & Legal Studies* 217, 218.

evolutionary achievement, as part of a linear Marshallian progress from civil to social rights,¹⁵³ in which rights, once gained, cannot be lost. Instead, constitutionalisation is irreducibly contingent. It may be lost as easily as it can be won. This process of de-constitutionalisation can be stopped only when one abandons a formal account of nominal constitutional integration of rights for a functional one regarding their actual normative effect. In light of these findings, the overall thrust of the Greek experience is consistent with the sceptical wave in literature on constitutionalisation. In broad terms, Greece provides a new, continental European, basis for confirming Tucker's findings.

In showing that a constitutional cover for labour rights does not *per se* render the protective labour edifice bullet-proof from the capital constitution, the account developed in this paper reveals the limits of the constitution and law. As we move forward in uncertain times, learning from the reality of constitutional labour rights rather than a romanticised or idealist version of them is essential. The Greek experience shows, to paraphrase Marx, that even the most solid constitutional norms can 'melt into thin air' when confronted with capital interests. And this is not an academic abstraction. The frustration of constitutional claims for workers and their families translates into wage reductions, decline of living standards, humiliation in the workplace by employers ready to wield the upper hand, and a generalised feeling of injustice.

The Greek de-constitutionalisation issues a powerful reminder that the effectiveness of a constitutional labour edifice is not, and can never be, solely a juridical affair of formulating the rights norms or granting them the 'right' normative quality, but ultimately rests upon extra-legal social forces. If the Greek case, by exposing the limits of constitutionalisation, assists us in dispensing with the rights' illusions, it may be an unfortunate gift. A distraction to a true

¹⁵³ T.H Marshall, *Citizenship and social class* (Cambridge: CUP, 1950).

workers' emancipation can be pushed aside, at a critical time when workers and humanity are forced once again to struggle against the forces of the dystopian unbridled market.